

The Rising Tide:

Freedom of Information in Southeast Europe

Report of a Meeting held in Zagreb, Croatia, 20-22 March 2003

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Report of a Meeting held by the Open Society Justice Initiative, Article 19 and the Croatian Helsinki Committee, in Zagreb, Croatia, 20-22 March 2003

On March 20-22, a regional meeting on freedom of information (FOI) took place in Zagreb, bringing together Croatian political figures and activists with experts from throughout Europe. One objective of the meeting was to secure support for a Croatian FOI law and to discuss how such a law might look, given the recent wave of FOI initiatives throughout southeast Europe. Another was for FOI NGOs from countries with freedom of information laws to share their experiences with NGOs from countries in southeast Europe which have yet to secure such laws. The conference also gave participants from new and prospective NATO member countries an opportunity to discuss the limits of state secrecy in the context of national security.

Access to information—in particular government-held information—is, as one participant put it, “the oxygen in which a democracy breathes”. Freedom of information laws provide an essential means of engagement for all those directly or indirectly affected by government policy. In countries with a culture of free information, these laws have empowered individuals and organizations, in particular marginalized groups—minorities and migrants—to participate in government and/or ensure accountability. Freedom of information is central to transparency and crucial to successful anti-corruption initiatives.

But, freedom of information is not just good policy, it is also—as numerous speakers in Zagreb noted—a human right. The right to “seek, receive and impart information” is set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (Article 19 of both). Increasingly it is inscribed in national constitutions. “Public information is our property”, a Romanian participant said. “It is created using our money by civil servants paid with our money. To have access to information [...] is simply to activate the right to something that is already ours.” Croatian Minister of Science and Technology Gvozden Flego agreed: “At the root of democracy is the idea that the people, regardless of how we define them, have supreme

power—and have the right to know who is taking what decisions on their behalf.”

The tide of transparency is rising in Europe. Thirteen countries of central and eastern Europe have adopted FOI laws since 1989. Bulgaria, Romania, Slovakia all passed legislation recently, in part as a result of significant agitation by NGOs. The latest law, Slovenia’s, entered into force on 22 March 2003, while the Zagreb seminar was underway. The particular significance of this achievement in former communist countries should not be underestimated. Authoritarian regimes breed entrenched cultures of misinformation and mistrust. As one participant put it, official secrecy “has proven to be one of the harshest legacies of the totalitarian past and the most difficult to surmount”. More than a decade after transition, another noted, “we are still societies thirsty for information.”

High-level political support for a Croatian FOI law was a first objective of the meeting. A second was an exchange of views and strategies among NGO activists from countries with FOI laws and those without. A third aim was to provide an outline of existing international FOI standards, including by representatives of the London-based NGO Article 19 and the Council of Europe. Lastly, the tangled issue of national security and information access was opened for debate through interventions from Privacy International and the North Atlantic Treaty Organization (NATO).

Commitment to a Croatian FOI law

In opening the Zagreb event, President Sipe Mesia declared “I wish the Conference every success and I assure you of my full support in promotion of freedom of information.” The right of access to information was, he noted, “undoubtedly one of the fundamental human rights [and] one of the main principles of democracy.” Science Minister Flego pledged, “To the extent that it is in my power I will advocate the passage of an [FOI] law”. Representatives from the

Croatian Ministries of Culture and of Justice also participated in the two-day meeting.

OSCE Ambassador Peter Semneby noted that freedom of information is part of the fundamental human rights standards of the Council of Europe and the OSCE and “an ever more important priority in the EU”. “Secrecy as a system leaves us with a choice between authoritarianism and anarchy,” he said, “but there is an antithesis to this: transparency or, more specifically, freedom of information, a core value of a modern democratic society.”

Since the Zagreb workshop, a number of civil society organizations, including the Croatian Helsinki Committee and Transparency International Croatia, have taken the lead on drafting an FOI law in consultation with the Ministries of Justice, of European Integration and of Culture. The Council of Europe is also supporting this process and providing expertise on the draft law.

In another positive development, a representative of the Macedonian Ministry of Justice made a statement committing to the adoption of an FOI law and to signing a memorandum of understanding with NGOs on the drafting and adoption process.

Adoption and implementation in southeast Europe

At the Zagreb meeting, NGO and government representatives from countries and territories which do not yet have laws—Croatia, Kosova, Macedonia, Montenegro and Serbia—heard about advocacy experiences from those in countries which do—Albania, Bulgaria, Romania, Slovakia. These accounts included direct advice on campaigning strategies as well as tips in drafting legislation. A short selection, from Romania, Bulgaria and Slovakia, follows.

Romania: Ioana Avadani, Centre for Independent Journalism

Romania’s FOI law was adopted on 23 October 2001, following a targeted campaign by a loose coalition of six NGOs. The law provides that government information is freely available to the public, except in specified exceptional circumstances. Information relating to wrongdoing by public officials cannot be classified “secret”. Special departments must be established to make information available. Requested information must be released within ten days, unless the request comes from a media body, in which case

the limit is 24 hours. Failure to release information can result in a court order or a conviction. However the law provides no definition of the “public interest” and insufficient protection of whistleblowers.

An “informal coalition” of NGOs with expertise in different areas—law, human rights, media and academic scholarship—pushed hard for the law from the start, offered advice and suggested revisions to politicians, and provided a neutral space for overcoming political disputes. Informality was a source of strength: “it allows for flexibility, for fluent, direct and timely communication [and] speedy reaction, avoiding formal consultations or vote procedures. Each member took the lead when their field of expertise was most relevant and there were no disputes over ‘who’s boss’”. However, according to Avadani, the lack of a distinct coalition identity or “brand” may have weakened public perception of the FOI campaign.

International advocacy also contributed to adoption of the law. Comments on the drafts by local NGOs were complemented by those from international organizations such as Article 19 and the American Bar Association, resulting in a civil society version of the draft law. Submitted to parliament in Jan 2001, the law was adopted in October 2001—a rapid and smooth passage through parliament, which depended on coordinated and continued civil society pressure.

Bulgaria: Gergana Jouleva, Access to Information Programme

The Bulgarian “Access to Public Information Act” was adopted in July 2000, with the commitment of a government elected in 1997, in part due to the efforts of the Access to Information Programme (AIP), founded for that purpose in 1996.

AIP developed a strategy of promoting demand for information at the local level by, for example, creating a network of local coordinators in each region of Bulgaria to generate concrete requests for information. At the same time, a civic education project resulted in over 100 seminars, conferences and workshops held in 26 cities around the country and over 330 articles and reports in the electronic media.

AIP also made use of work in progress on other aspects of administrative reform. One such, funded by USAID, involved a program carried out in five municipalities (Blagoevgrad, Dobrich, Gabrovo,

Haskovo, and Stara Zagora) to improve the openness of municipalities and their relations with the public. In early 1998, representatives of the five municipalities committed to “make local government a friendly and effective provider of information and services to citizens.”

To achieve this goal, local government officials participated in a retreat at which strategies were developed, including: promoting a customer-oriented approach to citizens (as tax-payers and voters); taking tangible steps to make town halls easier to approach and friendlier; and involving local citizens and private sector actors in reforms. Activities to meet these goals included creating municipal service centres in the lobbies of municipal buildings and training municipal employees in customer-friendly practices. Staff in the service centres responded to requests from the public for information on procedures such as building licences, business licences, document registration and municipal property matters.

Opinion polls showed high levels of citizen-satisfaction with the service centres, and local journalists too reported that they felt better informed. Importantly, staff in city halls were enthusiastic about the project, in particular, their improved relations with the public. The initiative received much publicity in Bulgaria and contributed to a groundswell of support for adoption of an FOI law and for greater government transparency in general.

The Access to Information Program (AIP) was able to capitalize further on this experience by holding round-tables in each municipality with local government representatives, NGOs, journalists, and members of the public. Early draft FOI laws were presented and discussed, and a memorandum was addressed to the drafters in central government with recommendations for improvement.

Prior to the adoption of the Bulgarian FOI law, AIP also promoted police transparency. Together with local journalists, AIP worked with the Ministry of Interior and with regional police headquarters to train and brief spokespersons and to help define internal police standards governing the disclosure of information to the public. The project improved the quality and quantity of information available from the police, and contributed to a more open police attitude concerning communication with the public.

AIP’s strategy of working on a range of transparency projects in the run up to the adoption of an FOI law was a key part of the campaign—but another result was the creation of an excellent foundation for using the law after adoption.

Since adoption, AIP’s emphasis has shifted. “The law is only a beginning,” says Jouleva, “the challenge that remains is how to implement it.” Since the law’s enactment, AIP has launched over 50 court cases challenging refusals to provide information, ranging from budgetary information to data on complaints of ethnic discrimination to information about policies for dealing with stray dogs. A number of these cases have been decided at the Supreme Court. So far AIP and its partners have won ten cases, achieved positive settlements (with information secured) in five, and received supportive guidance from the courts in two cases (advice on how to reformulate the request). In only five cases did courts uphold initial refusals to disclose. The remaining complaints are still pending.

Slovakia: Vladimir Pirocik, Environmental Lobbying Facility

In Slovakia the NGO drive for an FOI law commenced after the passage in 1998 of the Law on Access to Environmental Information. This law proved to be inadequate: among other things, it allowed 180 days for release of information, applied to a limited number of public offices and lacked enforcement mechanisms. Environmental organizations were quickly joined by others in pressing for a comprehensive FOI law. The campaign went forward in three phases.

In the first, preparatory phase, views were solicited from NGOs around Slovakia and information was prepared for public education. This resulted in a set of nine principles, including suggestions on time limits, enforcement mechanisms, and costs, which were later translated into a draft FOI law. In the second phase, NGOs pursued an intense campaign for adoption of the law, which included TV spots broadcast entirely on donated time, showing a man whose eyes, mouth and ears gradually disappear. This powerful image of a citizen withering from lack of information was reproduced on postcards distributed around the country via grassroots networks. Of 50,000 cards distributed, 12,000 were sent to the parliament by citizens, urging deputies to vote for the law without changes.

The law was adopted by the Slovak Parliament in May 2000 and came into effect on 1 January 2001. Now NGOs are in the final phase of the campaign: strategic litigation to enforce the new law. “Adopting the law”, said Pirosik, “is only a third of the task. The next third is to get public administrators used to their obligations and the last third is to inform and encourage the general public.”

Standards in freedom of information legislation

Basic standards for FOI legislation are set down in Article 19’s Principles on “The Public’s Right to Know” and in the Council of Europe’s Recommendation on Access to Official Documents. The vigorous exchange of views in Zagreb highlighted certain themes which recur as potential flashpoints in FOI adoption and subsequent implementation.

Who has access? It was noted that the right of access to information should be available to all persons, legal and natural, and should not exclude non-citizens or NGOs.

Who is covered by the law? All bodies performing public functions should be covered by the law. This can be done either through a broad definition of the public interest, or by defining the public functions of bodies covered. The Council of Europe definitions cover all natural or legal persons performing public functions and those exercising executive authority. But they do not include legislative and judicial authorities despite their centrality in a democratic society, leaving these to the discretion of member states.

What timeframe is reasonable? In Slovakia, 98% of requests are answered within the ten-day limit established in the new law. The Romanian law also has a ten-day response requirement. It was suggested that the 30 day-period proposed in the Croatian principles is unnecessarily long (although shorter than the 60 days in the current Croatian administrative law).

Should journalists get special treatment? The Romanian law has a separate chapter for the media although NGOs fought against it, viewing it as unnecessary “positive discrimination”. Inclusion of this provision followed long discussions on definitions of journalists and accreditation which, the principal Romanian NGO coalition suggested, remain vague and weaken the law. Public entities are required to hold monthly press conferences and spokespersons must take questions. Many participants agreed that special

treatment for journalists risks distorting the essentially non-discriminatory and public nature of a law on access to information.

What about the private sector? The business community generally has a direct interest in accessing information, and in the U.S. businesses are heavy users of the FOI Act. NGOs however, do not always recognize the importance of this constituency in their lobbying efforts. The Albanian business community has expressed concern about breaches of the public procurement law, but it is not clear how extensively private companies have tried to use it. In Bulgaria, there was strong support from the business community to found the Access to Information Programme, and business groups were quick to bring cases.

Is “no reply” a refusal? Under Romania’s FOI law, failure to provide information or respond to requests within the timeframes set by the law constitutes a refusal to provide information and can be appealed. Bulgarian litigation too has established that silent failures to respond are refusals and thus that silence alone is not legally sufficient; reasons must be provided.

What constitutes a public document? In a case in the Netherlands, the restaurant bills of a Minister were requested to establish whether his use of public funds had been appropriate. The Dutch Council of State, the highest administrative court, ruled that the amount paid in a restaurant out of public money is public information, but details of the food eaten or of means of payment (credit card number) are not. The Council of Europe Recommendation (see above) applies in principle to all information held by a public authority, including data created or received from a third party and data existing only in digital form. Preparatory documents are regarded as public in some countries such as the Netherlands.

What should be exempted? Restrictions on information should be narrow and clearly defined. Broad exemptions give too much scope for abuse of the law. Typical exemptions include national security; the protection of public safety; monetary policy; crime prevention and crime detection; and protection of the deliberative process of a public authority. Blanket or “class” exemptions are not acceptable. Exemptions should be decided on a case by case basis and subject to a test of “actual harm” to the interest being protected, weighed against the public interest in receiving the information. Preferably exemptions

should be reviewed when an information request is filed.

National Security and NATO

All the countries in central Europe that have adopted FOI laws in the past ten years have also adopted State Secrets Laws. Although the classification of documents is a separate issue from access to information—classification signals primarily how a document should be stored, handled and used internally—the two are clearly tied at the point of public access. With national security a rising concern for many governments today, those seeking to safeguard the fundamental democratic principle of information access face increasing challenges.

David Banisar, Privacy International

The U.S. government defines national security as national defense and foreign relations information. The Lima Principles use a narrower definition—relating to internal order and military intelligence which threatens territorial integrity or the democratic system itself—including military plans, cryptography, and scientific information related to nuclear and other security matters. Most laws require that “identifiable harm” would be caused by the information’s release. Some recent laws set out what should *not* be classified. For example, the Mexican FOI law (2002) prohibits classification of information relating to human rights abuses. The new Slovenian law prohibits information relating to crimes from being withheld from the public in the name of national security.

The costs of classification are an important consideration, particularly if information is going to be kept secret for a number of years—five, ten, or even 30 or 50 years. Generally the costs are very high: keeping information secret and protected requires space, locks, alarms, safes and personnel who must be vetted and monitored, technical security for electronic information systems, education and training of all the persons handling the information, as well as general

records management. This costs the United States at least US \$4.7 billion per year. Following a report on the burdens and costs of classification by Senator Moynihan, President Clinton introduced an executive order on declassification in 1995, declassifying 1.6 billion pages (1,600,000,000) of documents 25 years old or more, and 964 million pages between 1995 and 2001.

Zsolt Rabai, NATO

There is no NATO policy on access to information and NATO has no views on the FOI policies of its member states. NATO does have a policy on information protection, however, and an elaborate procedure for keeping information secret, including for the security clearance of all those who handle information, including government ministers.

Nevertheless, public support—and therefore transparency, accountability and public trust—are important, particularly in the “current security environment.” Yet, as a multilateral forum for intelligence information exchange, NATO must protect information—particularly when the lives of NATO’s soldiers might be at risk. The needs of transparency *and* secrecy are both important today.

The NATO principle of civilian control over defense requires transparency of structures and procedures. The NATO definition of civilian control refers to parliamentary oversight of the military, rather than oversight by civil society. NATO is accountable to national governments and parliaments. Countries decide on the level of classification of their information—and if a country supplies “classified” documents to NATO, then this classification is to be respected by other members whether or not they regard the information as sensitive. Many countries have laws with class exemptions which, NATO generally argues, are an impractical way of managing secrets. It was noted that information access laws and state secrecy laws can benefit from being harmonized or coordinated.

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The Open Society Justice Initiative, an operational program of the Open Society Institute, promotes rights-based law reform, builds knowledge and strengthens legal capacity worldwide. Justice Initiative projects seek to shape law reform policy and achieve concrete results through hands-on technical assistance; litigation and legal advice; knowledge dissemination and network building; and counsel to donor institutions. The Justice Initiative works in the following thematic areas: national criminal justice reform; international justice; freedom of information and expression; anticorruption; equality and citizenship. Its offices are in New York, Budapest, and Abuja.

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